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UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

SEVEN JOHN DOES, )  
 )  
Appellants )  
 )  
v. ) Docket Nos.: DA08318110337  
 )  
OFFICE OF PERSONNEL MANAGEMENT, ) and  
 )  
Respondent ) DC08318110596  
 )

INITIAL DECISION

By: Edward J. Reidy  
Administrative Law Judge

Date: May 20, 1982

With appearances by:

Joseph D. Gebhardt, William A. Dobrovir, Jack B. Solerwitz, Glenna Rubin and David S. Heller, Attorneys, for appellants.

Susan Warshaw, Attorney and Joseph A. Morris, General Counsel, OPM, for respondent.

I. INTRODUCTION

On March 18, 1981, seven United States government employees appealed a decision of the Office of Personnel Management (OPM) which denied their request that time in service as employees at the Central Intelligence Agency (CIA) be credited along with subsequent time in service at the Drug Enforcement Agency (DEA) for purposes of calculating eligibility to retire under the provisions of 5 U.S.C. 8336(c) <sup>1/</sup>. Thereunder an employee completing 20 years service as a law enforcement officer is entitled to an immediate annuity if separated after becoming 50 years of age. On February 26, 1981, OPM had disallowed appellants' claim for service credit at the CIA holding their prior duties did not satisfy the definition of law enforcement officer contained in 5 U.S.C. § 8831(20).<sup>1/</sup> Succinctly, OPM found

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<sup>1/</sup> See the Appendix to this decision.

Exhibit A  
Dobrovir v. Chavez  
C.A. No. 8936-85

appellants' CIA duties had been essentially intelligence related and not akin to law enforcement functions. Further strengthening OPM's conclusion was the fact that the CIA is prohibited by statute from exercising "law enforcement powers". See 50 U.S.C. § 403(d)(3).

Appellants had also sought from OPM an administrative variation of the regulations relating to this special retirement arguing that misinformation given by DEA officials had prompted them to leave employment with CIA. This request was for a variation denied by OPM on January 23, 1981, on the grounds it was without authority to vary the terms of a statute.<sup>2/</sup>

Because the issues in each appeal are essentially identical all have, without objection, been consolidated. 5 C.F.R. § 1201.36. The matter has been referred to the undersigned for hearing and initial decision. Oral hearing was held on December 15 to 21, 1981 in Washington, D.C. Post hearing briefs have been filed and are discussed, infra.

## II. FACTUAL BACKGROUND

While there is some difference in the facts applicable to each appellant, many are identical so that a description of the general factual predicate need only be augmented by a capsulization of the facts peculiar to each appellant. All appellants were once employed by the CIA as special agents. Because of the specialized experience in the area of narcotics gained with the CIA they were recruited by, and transferred to, DEA or its predecessor at various times in 1973 and 1974.<sup>3/</sup> During that era, then President Nixon instructed DEA to establish its own sophisticated narcotics intelligence capability not only to relieve CIA of this obligation but also to spearhead a nascent war on drugs. In fulfillment of this directive DEA set about recruiting suitable personnel such as appellants.

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<sup>2/</sup> In their post-hearing brief, six appellants have effectively abandoned their request for a variation. No further consideration will be given this issue.

<sup>3/</sup> Prior to DEA the agency in question was the Bureau of Narcotics and Dangerous Drugs (BNDD). In this report the distinction is unimportant to the outcome, and at times the labels are used interchangeably.

Before transferring from CIA to DEA, all appellants were informed their move would involve no significant change in functions and advised in no uncertain terms by officials of DEA that their prior coverage under the special Central Intelligence Agency Retirement and Disability System (CIARDS) would be credited toward computation for retirement in the Law Enforcement Retirement Program covering DEA's "GS-1811 Special Agent". Under both programs, an individual in service is eligible to retire upon completion of 20 years service and reaching 50 years of age.

No appellant received any documentation from any agency, or outright declaration from CSC, that their service at CIA would be transferable to the special retirement they were told they would be entitled to. But they never expected anything more than oral assurances because all were experienced in working in a clandestine environment and had grown accustomed to relying and acting upon the mere word of superiors. Had they not been assured about the ready transferability of their special retirement benefits, none would have left CIA.

Not long after the transfers were accomplished, appellants were advised their prior service with CIA could not be credited towards special retirement from DEA because the Civil Service Commission (CSC) did not consider them so entitled. Moreover, they were told the officials who made the retirement pledges were not only in error, but had no authority to make such promises. Stunned by what appeared to them to be an act of perfidy, appellants began their quest for redress. They have now reached this juncture.

#### A. The Individual Appellants

1. Robert A. Simon. Simon became a civilian employee of the CIA in June of 1959. That employment terminated in June of 1974 when Simon resigned to join DEA as a special agent. Early in 1974 appellant had learned at a CIA staff meeting that DEA was expanding its narcotics investigation effort and was seeking experienced hands with special qualifications to join this endeavor. Simon's interest was stirred and to gain further details he contacted Lucien Conein of DEA. Conein explained the new job, promotion prospects, transfer details and that each recruit's career status would be retained. In the new job the target would be drugs and the work comparable to that Simon performed at CIA.

Simon was persuaded. When he transferred to DEA, Simon was 48 years old and but two years short of retirement under the CIARDS program. Preserving this desirable retirement option was foremost in appellant's mind and induced him, at virtually every meeting relating to his prospective transfer, to demand reassurance that his years at CIA could be tacked to any years earned at DEA to achieve entitlement for special retirement. This vital interest was brought to the attention of John Conroy, a personnel officer at CIA, Conein, the DEA official spearheading the recruitment, and Jesse Gallegos a personnel official at DEA, and later, "others". All assured him there was no problem and Simon elected to transfer.

a/ Once at DEA, Simon soon learned there was doubt about the transfer of his CIA time to the new agency. Concerned, Simon sought a definitive statement from DEA and was then informed that CSC had concluded his years at CIA were not transferable. Simon continued his efforts to obtain satisfaction of these retirement promises but was hampered first by an injury and later by his duties in a deep cover penetration effort. Nonetheless he inaugurated a grievance procedure which culminated in a response from DEA that the CIA time in question was not transferable. The misrepresentations were brought to the attention of Mr. Bensinger, the Administrator of DEA, and of Mr. George Bush, Director of CIA. Both expressed concern over the apparent inequity, but neither could provide any redress. Other attempts to obtain relief came to naught. a/ Determined to make every responsible effort to rectify "this terribly unfair situation", Simon filed this appeal.

To Simon's mind his work at DEA differed imperceptibly from that at CIA. Investigative techniques; recruiting and developing informants; conducting surveillances; the equipment used; and long work hours on assignments unbeknownst to family were nearly identical at each agency. Although the hazards at CIA were greater than those experienced at DEA, both assignments involved armed and unarmed confrontations. Simon operated under cover at times in each agency and interrogated, investigated and filed reports in

comparable manner at both. At CIA and at DEA appellant was involved in joint operations with police officials, ranging from the cop on the street to FBI, customs and kindred agents. In both agencies Simon's duties overseas involved liaison with foreign police officials. While at the CIA, if Simon uncovered narcotics information it would be transmitted to CIA and DEA officials. While CIA agents are not primarily concerned with enforcing the criminal laws of the United States, if a CIA agent learns of such a violation, it is reported to appropriate officials. As a matter of fact, some assignments at CIA involved the observation and reporting of U.S. criminal law violations. At DEA, Simon could make arrests in the United States, but not while at CIA. In foreign countries agents of neither agency can make arrests. But in certain overseas countries, DEA agents and CIA agents did "exactly the same thing".

Simon views law enforcement as not only the act of enforcement, but as including, variously, such essential ingredients as gathering information, or intelligence, surveillance, collating background information, and, in sum, the piecing together of everything in order to make "a case".

To cap his appeal here, Simon points out he has always performed his duties responsibly, even in times of great personal danger, and had been promised that no loss of retirement benefits would befall him upon transfer to DEA. Nonetheless, relying upon those promises he transferred to DEA, lost his law enforcement entitlement and has been forced to work an additional five years to obtain retirement eligibility. He feels betrayed by leaders who made irresponsible promises compelling him not only to work beyond age 50 but to endure the tragic ordeal of burying a young daughter, brutally murdered by narcotics' dealers in vengeance for his success as a DEA agent.

At no time while at the CIA did Simon enforce the criminal laws of the United States because the CIA is prohibited by law from so doing. Nonetheless some assignments had the goal of obtaining indictments against violators. At both agencies violations of criminal laws are detected and

brought to the attention of others and there are times when both agencies go beyond the scope of their particular focus and support law enforcement endeavors.

2. Terry T. Baldwin. He is now 43 years old and employed by DEA in Dallas, Texas. Baldwin intends to retire from government service upon reaching age 50 if eligible. He joined the CIA in September of 1965 and worked there until February 17, 1973 when, on his own initiative, he transferred to the predecessor of DEA.

Baldwin found no change in functions or duties once he made the switch and, particularly while overseas, became aware the duties of a CIA agent involved in narcotics intelligence were analagous to those of DEA agents. Indeed, agents of both agencies work side-by-side. Neither had arrest power overseas, but both organizations used identical investigative techniques. For CIA and DEA, informants were their lifeline in an overseas environment. Both filed comparable reports on intelligence assignments and investigations. In the area of narcotics intelligence, Baldwin says the primary duty of DEA and CIA agents overseas was to insure that violators of the law were arrested by foreign police authorities.

When considering the transfer Baldwin was keenly aware of the need to insure time spent with CIA would be creditable for 50/20 retirement from BNDD/DEA and would not have made the move unless assured of the creditability of his service toward early retirement. Baldwin was advised that there would be no need for him to undergo agent training at his new agency because he was fully qualified already and, furthermore, would be performing the same duties he had at CIA.

Baldwin became a successful agent at BNDD/DEA even without any training due, in his opinion, to the fact his duties at CIA and at DEA were precisely the same. Baldwin's success led BNDD/DEA to recruit others from the CIA. Although other agents came on board some 15 months after Baldwin, DEA had not yet cleared the retirement creditability question with CSC.

Appellant was rebuffed as he persisted in seeking assurances about his retirement and, when he learned the other six appellants felt that DEA had "renege" on various retirement promises made to them he sought more answers. Claiming he got no reasonable replies but some sympathy, he ultimately was tersely told he was free to go back to CIA because the time was not creditable at DEA.

No one at CIA promised Baldwin his time there was transferable to DEA; he never sought information from CSC about the promises made; and never was shown any documentation to substantiate his retirement credit. Baldwin's position at CIA was not that of a law enforcement officer because that agency is proscribed from performing law enforcement. But if he detected a violation of law, it was reported to appropriate officials. While employed by CIA, Baldwin never arrested, nor was he directed to arrest, anyone for violations of the criminal laws of the United States.

3. Elias P. Chavez. Appellant joined the CIA on June 2, 1967 and remained until he transferred in February of 1974. Upon first considering a transfer to BNDD/DEA he made a number of inquiries about the new role, including a specific question about retirement credits. Assured by several officials of DEA that his retirement eligibility was intact, he ultimately made the transfer. A few days after the transfer, Chavez was awarded the CIA Star of Valor, the highest award for heroism given by the agency. At that ceremony Chavez again gained the impression from Director Colby there was no doubt about the transfer of CIA time.

At the time he was sworn in at DEA, albeit in a clandestine ceremony at a disguised location, Chavez was again assured his CIA time was transferable for retirement credit. Soon Chavez embarked on a covert assignment in a foreign country. Just as the other appellants, Chavez found the transfer involved no change in functions because the DEA agent and the CIA agent assigned narcotics intelligence functions or terrorism control in a foreign country performed similar functions, used comparable techniques and employed

the same equipment. Both had the purpose of insuring that law enforcement action was taken by appropriate officials against those involved in drug dealings as well as to interdict the flow of drugs into the United States and to preclude the use or possession of drugs by United States citizens, including military personnel overseas.

It was not until mid-1976 that Chavez learned his time at CIA would not be credited for 8336(c) retirement. Feeling aggrieved, he sought redress culminating in this action.

CIA duty in the narcotics intelligence field overseas hardly differed from that of the DEA agent but Chavez says, when DEA so performs, it is called law enforcement. Many duties at CIA provided information which aided in the enforcement of the laws of the United States even though the CIA is not tasked to so perform.

Although Chavez is retired on disability pursuant to action initiated by DEA, he is subject to return to service if physically qualified and hence seeks a decision here because of this eventuality.

The wife of appellant Chavez corroborated that at the award ceremony Director Colby advised her husband he would receive credit at DEA for CIA service in seeking 8336(c) retirement.

4. Louis J. Davis. Now 45 years of age, Davis joined CIA in 1961. Early in 1974 he learned about the Narcotics Intelligence Officer (NIO) Program being planned at DEA, and was encouraged to seek employment there. Lured by the promise of overseas duty, Davis was hired on May 3, 1974 by DEA. Nonetheless, prior to transferring appellant sought and received assurance from several DEA officials that his special agent time at CIA would be freely transferable to retirement at DEA under 8336(c). He consulted no personnel experts on the issue because having being given assurances by senior officials, never felt the need to.

The transfer saw no change in appellant's functions. The duties he performed at CIA were said to be "similar" and even "identical" to those later performed at DEA. Indeed, appellant believes he was hired at DEA

because of his expertise in kindred duties at CIA. At DEA he would use his skill in interdicting the flow of narcotics before the drugs reached the United States. Targets would be those usually untouchable by traditional law enforcement officials, for instance, relatives of foreign dignitaries. Appellant says that in the narcotics interdiction effort, intelligence and law enforcement cannot be separated.

One of his early assignments with DEA was at the El Paso Intelligence Center in a role comparable to that he had performed at CIA. Another early assignment involved spotting and recruiting informants, a task comparable to duties previously performed at CIA. Even his current domestic confidential assignment is very similar to assignments performed while overseas with the CIA. Both agencies work with other law enforcement and intelligence organizations, often having the same target, namely drug dealings by highly placed persons.

Davis emphasizes that overseas, the CIA agent operating in the narcotics intelligence field functions in a manner indistinguishable from the DEA agent. Both work toward gathering sufficient information to have drug dealers arrested. Appellant insists at CIA he did more than gather intelligence, for he was carrying out foreign policy by enforcing laws overseas. To him, neutralizing the drug violator has the effect of an arrest.

5. Hugh E. Murray. Murray joined the CIA in May of 1960 and served with that agency until his transfer to DEA on May 3, 1974. While serving overseas with CIA his duties required liaison and joint operations with host country police and intelligence personnel. Today, with DEA, he does likewise. Especially overseas, the everyday CIA functions were "quite similar" and in many cases "identical" to daily duties performed at DEA. One of his earliest duties at DEA involved temporary operations in a foreign country, where hand in glove with CIA agents he went about developing informers previously used by CIA to become informants for the DEA. Murray stated that his first year at DEA "was an exact duplicate of" his case officer work at CIA.

Notwithstanding the initial attractiveness of DEA, Murray sought and received very emphatic oral assurance that his CIA service would be creditable toward 8336(c) retirement. Absent such assurance, appellant would never have left CIA.

6. Mr. A.<sup>4/</sup> Appellant began employment with CIA on December 3, 1961 and performed duties similar to those of his fellow appellants. During his tour with CIA he was called upon to report information on indictments, illegal aliens, smuggling, narcotics trafficking, violations of neutrality laws, gun running, importing and exporting of firearms, passport fraud and terrorism against U.S. officials. He views these duties as clearly supporting the criminal law enforcement functions of the United States.

Appellant also detailed a specific assignment where his role at CIA paralleled that of his DEA counterpart. That is to say they worked together, officed together, shared information and informants, filed identical reports and worked in tandem on the same target. Liaison with foreign police was an important part of this role.

In the early 1970's appellant heard of the emerging NIO Program and his DEA counterparts encouraged him to join on the theory he was already doing the work. Assured that his retirement credits would be retained, Mr. A, in an interview with DEA officials, was advised that at DEA he would be doing the same thing he did at CIA. What is more, he was unequivocally told his CIA retirement credits were freely transferable to the 8336(c) series at DEA. Absent such assurances Mr. A never would have left CIA, because the prospect of retiring at age 50 was very important to him. Today he has every intention of retiring at age 50 if eligible.

Mr. A never spoke to former CIA agents about their 8336(c) credit, was never told CSC had approved the transfer of credits, and never himself sought advise from CSC. He was unaware of any retirement problem until on board at DEA.

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<sup>4/</sup> This appellant has been so identified for reasons of privacy. His true identity is known to those having a right and a need to know.

Appellant concedes CIA is not a law enforcement agency. He counters by saying even at CIA he had a primary duty to have people arrested and indicted, albeit by another agency with whom he worked shoulder-to-shoulder.

Because there also were instances in CIA when information gathered by him led to arrest of drug dealers trying to enter the United States, he felt he was engaged in enforcing the laws of the United States.

7. Wesley C. Dyckman. The last appellant submitted an affidavit. He was induced to transfer from CIA to DEA on the assurance that his CIA retirement credits would automatically transfer to DEA. Because all interviews were conducted at the CIA, and believing the promises made had the imprimatur of that agency, Dyckman saw no reason to question the assurances given.

At the time he transferred, Dyckman had 12 1/2 years service at CIA. Without the retirement representations made, appellant would not have switched to DEA but would have remained with CIA.

Several present and former officials at DEA testified at the hearing. They recruited CIA agents to transfer to BNDD/DEA as cadre for its NIO Program because it was launching a clandestine intelligence collection effort to develop information on drug traffickers and considered experienced agents at CIA as logical candidates. CIA was fully supportive of these recruiting efforts. Recruits were given oral assurances their service at CIA would be creditable toward 8336(c) retirement from DEA, although no recruiter had obtained an authoritative decision on this view from CSC and no recruit was ever told CSC had authorized that credit.

These officials explained that overseas, the powers of DEA agents varied according to location, but in no event are these agents authorized to make arrests. A prime responsibility of DEA is to interdict the flow of drugs into the United States and DEA and CIA exchange narcotics intelligence information with each other. Among the duties DEA agents perform overseas are to (a) assist local law enforcement agencies in narcotics suppression; (b) exchange with these agencies intelligence information; (c) train local agents; (d) assist local agencies in certain operations; and (e) collect and analyze intelligence information about international drug traffic.

These witness recall that all prospective transferees expressed concern over their rights, especially the 8336(c) retirement benefits. Everyone seemed to agree that each agent transferring from CIA to DEA would receive 8336(c) credit for his CIA time. Indeed, a clear inducement for CIA agents such as the seven appellants here to transfer to DEA was the understanding their time as CIA agents would be counted toward 8336(c) retirement from DEA.

In a given situation there can be differences between a case officer with CIA and an investigator at DEA. The former are essentially intelligence officers while the latter are investigators. In the NIO program, however, agents perform both an investigative and an intelligence function.

Certain officials now with DEA suggest, in equity, that these appellants receive appropriate credit. DEA fully intended to award appellants credit toward 8336(c) retirement based upon their service at CIA, but amendments to the law in 1974 have made it more difficult for an agency to obtain 8336(c) credit for its personnel. At any rate, DEA has been unable to satisfy its pledge to these appellants.

No CIA personnel officer was able to find any documentation in the files of the seven appellants that their CIA time would be creditable and the CIA concludes if any such assurances were made, they must have been by DEA officials.

William Colby, Director of the CIA from 1973-76 was aware of, and fully supported, the NIO Program, because the CIA had a wide range of other duties such that the proposed transfer of functions was welcomed. CIA assisted DEA in its recruitment efforts. Colby agreed that the CIA is not primarily tasked to perform law enforcement duties and was unaware of any agreement concerning 8336(c) retirement matters.

Thomas C. Tripodi, an employee of DEA is in charge of Rapid Response Teams in Europe and is receiving credit toward 8336(c) retirement. Following military service, Tripodi became a narcotics agent for the old Federal Bureau of Narcotics (FBN) on January 11, 1960 and earned 8336(c) credit. He remained so employed for just less than three years until recruited by the CIA where he became a special agent. At that time he was assured that his

FBN time would be credited toward retirement from the CIA and that if he ever returned to FBN, his time with CIA would be counted. He remained at CIA for some 5 1/2 years when he transferred to FBN's successor agency, BNDD, to assist in resolving an internal corruption problem. Upon transfer, Tripodi was "assured" orally by personnel that his time at CIA would be credited toward retirement from BNDD under the provisions of 8336(c) but he received nothing in writing.

In 1980, Tripodi sought from OPM clarification of his retirement eligibility. Contrary to what he expected because of the consistent assurances given, OPM declined to credit Tripodi's time at CIA toward 8336(c) retirement. Thus while his early days with FBN, and his later days with DEA were creditable, Tripodi received no such credit for his intermediate years at CIA.

While at CIA, Tripodi's duties were those of an investigator and security officer. He explained there were "strong similarities" between his duties at DEA and at CIA. Both agencies would identify a target posing a threat which had to be neutralized or eliminated. Techniques used in both agencies involved surveillance, interviews, recruiting, interrogations, report writing and rapport with local law enforcement agencies. On three occasions while at CIA Tripodi took individuals into custody and turned them over to a law enforcement authority. Also while at CIA Tripodi was squad leader of a group of 50 armed men who insured the physical security of installations.

Tripodi agrees that while at CIA he was not primarily engaged in enforcing the laws of the United States.

#### OPM'S WITNESSES

Andrew E. Ruddock, now retired, was Director, Bureau of Retirement, Insurance and Occupational Health (BRIOH) at CSC from 1959 to 1973. Comparing various retirement provisions, Ruddock described the CIARDS system as very flexible in that CIA Director has discretion in determining whom to designate as participants in the system. On the other hand, Ruddock does not view the 8336(c) retirement nearly as adaptable because eligibility